

EXHIBIT

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May 14, 2009

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**RE: THE SELECTION OF A FIFTH MEMBER TO THE MONTANA  
DISTRICTING AND APPORTIONMENT COMMISSION**

To the Honorable Members of the Montana Supreme Court:

In keeping with the spirit of Montana's open meeting laws, we send you this letter as an open communication as you start your deliberations in the appointment of the fifth member on the Montana Districting and Apportionment Commission (hereinafter "commission").

In this letter, we first set out a brief history of reapportionment and redistricting in Montana since 1972, in order to provide context for the rest of the letter. We commend the Court for opening the deliberations and involving the public in the Court's selection of commission chair. We respectfully ask the Court to clarify the appointment process and stress the need for a non-partisan, neutral commission chair who will involve all parties, insist on openness, and facilitate compromise.

**A. Brief History of Reapportionment and Redistricting in Montana since 1972**

When the framers of the state Constitution addressed the problems associated with redistricting in Montana, they knew they had to create a framework to take the process out of the hands of the Legislature, where partisanship and rural-urban scuffles had made it impossible to properly reapportion the state. The new constitution created an

# **WHERE TO DRAW THE LINE: CRITERIA FOR REDISTRICTING IN MONTANA**

Prepared for the Montana Districting and  
Apportionment Commission  
by Lisa Mecklenberg Jackson  
Staff Attorney  
April 2010

In the 2000 cycle of redistricting, 42 states were sued, and in more than a dozen, courts either drew or modified district plans.<sup>1</sup> What steps can the 2010 Montana Districting and Apportionment Commission take to make sure Montana is not one of those states in the 2010 cycle? One of the answers to that question lies in the selection of appropriate criteria adopted by the Commission to be utilized in drawing district lines.

<sup>1</sup> The U.S. Supreme Court has recognized that state courts have a significant role in redistricting and requires federal courts to defer to state courts. Scott v. Germano, 381 U.S. 407 (1965). After a federal court has determined that a state redistricting plan violates federal law, it will usually allow the state authorities a reasonable time to conform to state law. Vera v. Richards, 861 F. Supp. 1304 (S.D. Tex. 1994), aff'd Bush V. Vera, 517 U.S. 952 (1996). Once a state court has completed its work, the Full Faith and Credit Act, 28 U.S.C. Section 1738, requires a federal court to give the state court's judgment the same effect as it would have in the state's own court. Parsons Steel Inc. v. First Ala. Bank, 474 U.S. 518 (1986). A state's judgment may only be modified by the U.S. Supreme Court on appeal from the state's highest court.

The purpose of this memo is to inform the Montana Districting and Apportionment Commission of the requirements imposed by law for redistricting congressional and

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legislative districts and offer possibilities for potential discretionary criteria for legislative districts.

The Commission should adopt separate sets of criteria for congressional and legislative districts and be especially careful in applying the same mandatory and discretionary criteria to each district. The issue of redistricting is complex in that it involves both federal and state laws and Constitutions. Accordingly, some background information regarding the legal framework surrounding redistricting is essential.

## **BACKGROUND—OR PUTTING THINGS INTO PERSPECTIVE**

Federal courts use two different standards for judging redistricting plans—one for congressional plans and a different one for legislative plans.

### **Criteria for Congressional Plans<sup>2</sup>**

<sup>2</sup> Based on the 2010 Census, the U.S. population is apportioned among a set number of districts, whose

the Commission's plan and his refusal to do so was a violation of the Montana Constitution.

Several Montana Attorney General Opinions also serve to illustrate that the Districting Commission has the power regarding redistricting processes, and not the legislature. "The constitution and statutes provide no authority for changing Senators' terms after reapportionment. The reapportionment plan is the responsibility of the Montana Districting and Apportionment Commission which has the inherent authority under Article V, Section 14 of the Montana Constitution to do what is necessary to implement a plan that complies with the state's laws. How to deal with holdover Senators is the responsibility of the Commission."<sup>48</sup> In 35 A.G. Op. 12 (1973), it was determined that prior to the adoption of the 1972 Montana Constitution, the apportionment power was granted to the Legislature via Article VI,

"With the adoption of the new constitution, the people of the state divested the legislature of all power concerning apportionment of the legislature, except for the power of recommendation in Article V, Section 14, 1972 Montana Constitution."

35 A.G. Op. 12 (1973)

<sup>48</sup> 40 A.G. Op. 2 (1983).

1889 Montana Constitution. However, with the adoption of the new constitution, the people of the state divested the legislature of all power concerning apportionment of the legislature, except for the power of recommendation in Article V, Section 14, 1972 Montana Constitution. Another opinion that same year provided that "the Commission to Redistrict and Reapportion has the exclusive power to determine the size of the legislative houses and the geographical makeup of the legislative and congressional districts, subject only to the restrictions of Article V of the Montana Constitution."<sup>49</sup>

So, as you can see, the 1% population deviation in statute does present some possible issues should the Commission select that as its population deviation standard. Accordingly, the Commission may wish to consider a bill draft repealing the 1% language from 5-1-115, MCA, to prevent these sorts of confusion and conflicts in the future. Or the Commission may decide to follow the 1% statutory deviation, in which case there is not an issue.

Regardless of which population deviation standard the Commission chooses, "as nearly practicable as possible," 5%, 1%, or something in between, the Commission should pick a population deviation standard as one of its mandatory criteria and take care to adhere to that standard in the

<sup>49</sup> 35 A.G. Op. 12 (1973).

drawing of lines for each district. The Commission may be wise to pick a population deviation standard somewhere in between 5% and 1%, such as 3%, which would be looked at in conjunction with other mandatory and discretionary criteria. The Commission should also keep in mind that this issue of population deviation from the ideal district is one that will likely be addressed in the public comments received during the hearings in April and the Commission may get valuable input from that process regarding this decision.

## WRAPPING UP

The Montana Districting and Apportionment Commission should adopt mandatory criteria for redistricting congressional and legislative districts at a public hearing held prior to the time that the Commission begins the process of creating congressional or legislative districts. Throughout April 2010 the Commission will be seeking public comment on discretionary criteria and by next fall, the Commission should adopt the criteria it believes most appropriate for Montana. The mandatory criteria should be strictly applied. The discretionary criteria should be applied in a consistent manner in each district to the extent that they can be applied.

The meeting at which criteria are adopted can also be used to establish the content of the record of the Commission's meetings

and the method for maintaining that record. A well preserved carefully documented record clearly stating the grounds for the Commission's decisions with regard to each legislative district is essential for, among other things, historical research into the proceedings of the Commission and successfully defending against inevitable lawsuits (see introductory paragraph).

All discretionary criteria may not always be followed exactly, since sometimes the criteria may be at odds with each other, but if the Commission makes a good faith effort to consider and balance the criteria, the plan should be upheld as was found in *McBride v. Mahoney*.

The U.S. and Montana Constitutions and case law provide the foundation for criteria the Commission should adopt to guide redistricting and the criteria adopted should reflect the traditional redistricting principles recognized nationally. It is a complex balancing act that you, as Commissioners, must perform in applying the criteria consistently throughout the state. Good luck!

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TO: Montana Districting and Apportionment Commission members  
FROM: Lisa Mecklenberg Jackson, Staff Attorney  
RE: Summary of Montana court cases and attorney general opinions regarding redistricting  
DATE: September 24, 2009

### COURT CASES

#### Wheat v. Brown, 2004 MT 33, 320 M. 15, 85 P3d 765 (2004)

The 2003 Districting and Apportionment Commission plan for redistricting House and Senate districts assigned holdover Senators who were elected under the old districting system to redrawn districts under the new system. In response, the Legislature passed 5-1-116, MCA, granting to itself the power to assign holdover Senators to districts for the remainder of their terms and prohibiting the Commission from making those assignments. The Legislature then passed further legislation implementing its recommendations. Three of the holdover Senators challenged the legislative assignments. The District Court declared 5-1-116, MCA, and the implementing legislation unconstitutional, and the Supreme Court affirmed. Under this section, the mandate that the Districting and Apportionment Commission effect redistricting is self-executing, and the power to assign districts for holdover Senators is historically an inherent part of the redistricting process. The constitutional grant of redistricting power to the Commission constitutes a denial of any latitude to the Legislature to invoke its plenary powers. Thus, the 2003 legislation designed to transfer the power to assign holdover Senators from the Commission to the Legislature was unconstitutional and of no force and effect.

#### Brown v. Commission, Cause No. ADV 2003-72, 2003 ML 1896 (1st Jud. Dist., July 2, 2003)

On February 5, 2003, the Commission adopted the final redistricting plan (with some minor amendments). Commissioners submitted the plan to the Secretary of State as provided in the Montana Constitution. Bob Brown, Secretary of State, refused to accept the plan based on HB 309, which had been signed into law by Governor Martz on February 4, 2003. House Bill No. 309 required a plus or minus 1% deviation and the plan had been drawn using a criterion of plus or minus 5% deviation.

Secretary of State, Bob Brown, filed a complaint for declaratory judgment on February 5, 2003 requesting "the court to determine the constitutionality and statutory validity of the Statewide Redistricting Plan adopted by the Montana Districting and Apportionment Commission." A hearing for partial summary judgment on the complaint was held May 15, 2003, at the First Judicial District Court in Helena. Judge McCarter ruled, in summary, that "HB 309

impermissably conflicts with Article V, Section 14, of the Montana Constitution, and is void on that basis. HB 309 is not a valid implementation of Article V, Section 14, because that constitutional provision is self-executing, and because Article IV, Section 3, of the Montana Constitution does not authorize the legislature to interfere with the redistricting process beyond the express authority given to it in Article V, Section 14. The Secretary of State was required to file the Commission's plan, and his refusal to do so was therefore in violation of the Montana Constitution. Finally, the Secretary of State does not have standing to seek a declaratory judgment on the constitutionality of the Commission's plan."

The Secretary of State filed the plan and the 2005 districts became law on July 2, 2003.

Old Person v. Brown, 312 F3d 1036 (2002) (Pl. Petition for Cert. denied by U.S. Supreme Court, Nov. 17, 2003) Plaintiffs contended that the 1992 redistricting plan for the Montana House of Representatives and Senate diluted the voting strength of American Indians in violation of section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973. The plaintiffs also alleged that the redistricting plan was adopted with a discriminatory purpose in violation of section 2 of the Voting Rights Act. The federal District Court rejected both claims. The Ninth Circuit Court of Appeals determined that the District Court's finding that the plan did not dilute the voting strength of American Indians was based upon two errors. The errors were that white bloc voting in majority-white House districts was not legally significant and that American Indians were proportionally represented under the 1992 redistricting plan. The Ninth Circuit Court of Appeals reversed and remanded with instruction to determine whether, in light of the totality of the circumstances, vote dilution had occurred. On remand, the District Court held that the plaintiffs had limited standing and to prevail had to show, but did not show, vote dilution in the specific legislative districts where they resided. Also, the District Court held that even if the plaintiffs had shown vote dilution, their claim failed because of the unavailability of an adequate remedy. The District Court reasoned that the state would be redistricting in 2003, and the 2002 elections (the last elections to be conducted under the 1992 plan) were fast approaching. The plaintiffs appealed. The Ninth Circuit Court held that under the totality of the circumstances, it was not clearly erroneous for the District Court to determine that there was no vote dilution. The District Court's ruling dismissing the Voting Rights Act of 1965 claim based on the conclusion that there was no vote dilution was affirmed.

United States Department of Commerce v. Montana, 503 U.S. 442 (1992)

On appeal, the Supreme Court concurred that the method of equal proportions achieves the smallest relative difference between the populations of districts in different states. As between alternative methods, each of which measured equality differently, the Court held that Congress had not abused its discretion in selecting the method of equal proportions. Montana was left with only one congressional seat.

Montana v. Department of Commerce, 775 F. Supp. 1358 (D. Mont. 1991)

Since the 1930 census, Congress has apportioned seats in the House of Representatives using the mathematical formula called the "method of equal proportions." The formula had been

recommended by a committee of respected mathematicians appointed by the National Academy of Sciences to evaluate the various possible methods of apportionment. The committee chose the method of equal proportions as being the best for reducing both the relative difference between states in the population of districts and the relative difference between states in the number of persons per representative. Those ratios differ between states because every state is entitled to at least one representative, and the number of representatives assigned to a state must be a whole number. Thus, the congressional districts in each state must be the same size, but their size differs from one state to another.

Applying the method of equal proportions to the 1990 census count had caused Montana to drop from two congressional seats to one. Montana sued the Department of Commerce, home of the Census Bureau, alleging that the method of equal proportions did not achieve the greatest possible equality in the number of persons per representative. The District Court found the statute unconstitutional and enjoined the Government from reapportioning the House of Representatives using the method of equal proportions.

McBride v. Mahoney, 573 F. Supp. 913, 40 St. Rep. 1907 (D.C. Mont. 1983)

The 1983 Reapportionment Commission established five criteria to follow in redistricting that addressed governmental boundaries, geographic boundaries, communities of interest, consideration of existing district boundaries, and an attempt to stay within a 5% plus or minus deviation from the ideal district population. The court held that these criteria were considerations and that conflicts between them as they existed within a district or between districts must be balanced in arriving at a plan embracing the entire state. The Commission interprets its own criteria, such as what constitutes a community of interest and the possible ripple effects of any particular change; (thus when the Commission made a good faith effort to balance the criteria, the reapportionment plan could not be struck down on the contention that it failed to exactly follow its own criteria.) In the 1983 reapportionment plan, the population deviation between the largest and smallest House districts was 10.94% and between the largest and smallest Senate districts was 10.18%, which created a prima facie case of discrimination because the totals exceeded 10%. To be upheld, the deviations must be justified by legitimate state objectives. The court determined that legitimate state objectives were stated in criteria established by the Reapportionment Commission. The criteria addressed governmental boundaries, geographic boundaries, communities of interest, consideration of existing district boundaries, and an attempt to stay within a 5% plus or minus deviation from the ideal population. A reapportionment plan will not be struck down for failure to consider projected population growth when the Reapportionment Commission did not consider population projections and it was not presented with data that would have enabled it to apply population projections in a systematic manner.

State ex rel. Greely v. Mont. Districting & Apportionment Comm'n, First Judicial District, No. 46873 (Aug. 12, 1981)

After the 1980 census, the Attorney General sought a writ of mandamus to compel the Districting and Apportionment Commission to submit its plan to the 1981 Legislature. The District Court determined that the Commission must submit its plan to the first regular session of the Legislature following the Commission's appointment or to the first regular session of the Legislature following the availability of census figure, whichever came later. In this case, the

Commission was required to submit its plan to the 1983 Legislature meeting in regular session.

#### **ATTORNEY GENERAL OPINIONS**

**Reapportionment -- Holdover Senators:** Article V, sec. 3, Mont. Const., provides that state Senators be elected to 4-year terms on a staggered basis. The constitution and statutes provide no authority for changing Senators' terms after reapportionment. The reapportionment plan is the responsibility of the Montana Districting and Apportionment Commission. The Commission has the inherent authority under Art. V, sec. 14, Mont. Const., to do what is necessary to implement a plan that complies with the state's laws. How to deal with holdover Senators is the responsibility of the Commission. The terms of office of members of the Montana State Senate who were elected in 1982 may not be shortened as a result of reapportionment and redistricting. 40 A.G. Op. 2 (1983).

**When Plan to Be Submitted -- Recess and Reconvening:** The Commission to Redistrict and Reapportion is required under 5-1-109, MCA, to submit its plan to the 47th Legislature if census data is available in December 1980. The Legislature may recess and reconvene at a later date and still be within its regular session to receive and make recommendations, according to 5-1-110, MCA, on the Commission's plan. 38 A.G. Op. 99 (1980).

**Procedure for Submitting Reapportionment Plan:** The reapportionment plan should be submitted, with a cover letter signed by each commission member, to each house of the Legislature by the 10th day of the legislative session; and within 30 days of the return of the reapportionment plan from the Legislature, the final plan should be submitted, with a cover letter signed by each commission member, to the Secretary of State for filing. 35 A.G. Op. 50 (1973).

**Constitutional Grant of Power to Apportion -- Historical and Current:** Prior to the adoption of the 1972 Montana Constitution, the apportionment power was granted to the Legislature. (See Art. VI, 1889 Mont. Const.) However, with the adoption of the new Constitution, the people of this state divested the Legislature of all power concerning apportionment of the Legislature, except for the power of recommendation in Art. V, sec. 14, 1972 Mont. Const. 35 A.G. Op. 12 (1973).

✓ **Legislative Determination of Size of Legislative Assembly -- Not Controlling:** [The Commission to Redistrict and Reapportion was not bound by a legislative determination of the size of the Legislative Assembly,] and sections 43-106.6 and 43-106.7, R.C.M. 1947 (repealed by sec. 1, Ch. 14, L. 1975), enacted prior to the adoption of the 1972 Montana Constitution, are not controlling. 35 A.G. Op. 12 (1973).

✓ **Reapportionment Commission -- Exclusive Power to Apportion Legislative and Congressional Districts:** [The Commission to Redistrict and Reapportion has the exclusive power to determine the size of the legislative houses and the geographical makeup of the legislative and congressional districts, subject only to the restrictions of Art. V, Mont. Const.] 35 A.G. Op. 12 (1973).

**Reapportionment Plan Becomes Law:** Upon submission of the apportionment plan, proposed by the Commission to Redistrict and Reapportion, to the Secretary of State, the plan becomes law and all previous statutory provisions in conflict with that plan are, in effect, repealed. 35 A.G. Op. 12 (1973).

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## CONGRESSIONAL AND LEGISLATIVE REDISTRICTING CRITERIA

Adopted by the Montana Districting and Apportionment Commission  
May 28, 2010

### I. MANDATORY CRITERIA FOR CONGRESSIONAL DISTRICTS

1. Population equality. All congressional districts shall be as nearly equal in population as is practicable. (Article 1, Section 2 of the U.S. Constitution, U.S. Supreme Court cases).

### II. MANDATORY CRITERIA FOR LEGISLATIVE DISTRICTS

1. Population equality and maximum population deviation. Each legislative district shall be as nearly equal in population as is practicable. (MT Constitution). It is the goal of the Commission that each district have a population of 9,894 people for each House district and 19,788 people for each Senate district. Any deviation may not exceed plus or minus 3% from this ideal population. Each deviation will be accompanied by an explanation of the mandatory or discretionary criteria justifying such deviation. An explanation for the deviation shall be articulated and made part of the written record that accompanies each district description in the Commission report.
2. Compact and contiguous districts. Each district shall consist of compact and contiguous territory. (MT Constitution). The Commission may use, but not be limited to, a general appearance test regarding compactness of the district and consider the district's functional compactness in terms of travel and transportation, communication, and geography.
3. Protection of minority voting rights and compliance with the Voting Rights Act. No district, plan, or proposal for a plan is acceptable if it affords members of a racial or language minority group "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." (42 U.S.C. 1973).
4. Race cannot be the predominant factor to which the traditional discretionary criteria are subordinated. (Shaw v. Reno, 509 U.S. 630 (1993)).

### III. DISCRETIONARY CRITERIA FOR LEGISLATIVE DISTRICTS

1. Following the lines of political units. The Commission will consider the boundary lines of counties, cities, towns, school districts, Indian reservations, neighborhood commissions, and other political units.
2. Following geographic boundaries. District lines will be drawn to follow geographic boundaries as provided in the TIGER/Line files of the U.S. Bureau of the Census.
3. Keeping communities of interest intact. The Commission will consider keeping communities of interest intact. Communities of interest can be based on Indian reservations, urban interests, suburban interests, rural interests, neighborhoods, trade areas, geographic location, communication and transportation networks, media markets, social, cultural and economic interests, or occupations and lifestyles.

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